SUPREME COURT, U.S.

71-774

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. .....

NATHAN BROCKSTEIN and MANUEL BROCKSTEIN,
doing business as CHURCH AVENUE POULTRY,

Petitioners,

against

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners Nathan Brockstein and Manuel Brockstein, by their attorney, Jacob W. Friedman, respectfully pray that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Second Circuit rendered September 21, 1971, affirming, by a divided Court, a judgment of the United States District Court for the Eastern District of New York in favor of defendant (respondent herein).

Opinions Below

Copies of the opinions of the Court of Appeals (the first reported in 417 F. 2d 703) on two successive appeals by petitioners are hereto appended.

Jurisdiction

The judgment of the Court of Appeals was entered on September 21, 1971.

The jurisdiction of the United States District Court was invoked under 28 U. S. Code Sec. 1332.

The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. Code Sec. 1254.

Question Presented for Review

Where a liability insurance company refuses to settle a death action within the policy limits although the excess verdict thereafter rendered appears a virtual certainty, and fails to keep the insured informed concerning settlement negotiations or to advise that a relatively minor contribution by the insured would suffice to settle the action, does this course of conduct constitute bad faith so as to render the insurer liable to its insured for any excess payment the insured has been required to make?

Statement of Case

The genesis of the matter is an accident occurring in 1960. A truck driven by petitioners' employee was negligently backed up, struck one Kiely and caused his death. Petitioner was insured against such liability by respondent, with maximum coverage of $50,000. Kiely, who died eight days after the accident, was a man of 59, with a life expectancy of 16.4 years and annual earnings of $7,000. His administratrix was represented by Harry H. Lipsig, an experienced and well known lawyer, notably successful in actions of this character. The case could have been settled for $40,000, but respondent refused to

go above $35,000. However, petitioners were not informed of the status of the negotiations or that a relatively small contribution by them could have disposed of the litigation. The suit proceeded to trial, the jury returned a verdict of $95,000, and a judgment was finally entered for $106,413.33. Respondent paid the administratrix $50,000 plus interest and costs, while petitioners effected a settlement by paying $25,000, for which amount they sued respondent in the present action.

Upon the foregoing facts the United States District Court for the Eastern District of New York (Dooling, J.) rendered a judgment in favor of respondent. Petitioners appealed to the United States Court of Appeals for the Second Circuit, which in an opinion by Feinberg, Circ. J. (reported in 417 F. 2d 703, copy hereto annexed), held in substance: where the action of an insurance company in allowing a case to continue rather than settling it made it highly probable that the insured would be subjected to excess liability, and where the insured's personal exposure was high and the additional risk of the insurer was far less, the failure of the insurer to settle was indicative of bad faith; that in a suit by the insured against the insurer where the verdict was substantially more than the policy limit, where it could have been settled by an additional $5,000, it was essential to determine what the insured knew about the amount required to settle and would be willing to contribute; and that it was significant to ascertain whether the insured had been properly apprised of the likely risk. Accordingly, the case was remanded for further findings "as to (1) precisely what the Brocksteins were told or knew regarding the amount needed to settle the Kiely action, the amount the insurer was willing to contribute, and what their potential personal liability was, and (2) what they were then willing to contribute themselves."

A rehearing was held in the District Court, with further findings, all of which, as will be shown below, sustained the posture of petitioners. Nevertheless, the District Court adhered to its original determination and again rendered judgment in favor of respondent. Petitioners took a second appeal, and the judgment was affirmed, with Moore, Circ. J., dissenting.

It is from that determination that petitioners file the present petition for certiorari.

Reasons for Allowance of Writ

1. The conclusion reached by the District Court, and so far upheld on appeal is completely untenable in the light of the further findings made upon rehearing. Thus, in response to the issues emphasized by the remand, the District Court expressly found: (a) petitioners had the financial means to contribute $10,000 or even more (further finding 70 at 296a); (b) petitioners were not told "the amount needed to settle the Kiely action" (73-A at 298a); (c) petitioners were not advised of the settlement position so as to suggest that there was a difference to be made up (73-B at 298a); (d) petitioners would have contributed $10,000 or more if advised by respondent that they had the right to contribute to a settlement (76-A at 299c); (e) respondent never mentioned to petitioners that they had the opportunity "to make a relatively small contribution to avoid a large exposure" (77 at 301a); (f) no one on behalf of respondent indicated to petitioners that a contribution by them to settlement was possible (78 at 301a). In the face of these additional findings and the failure of respondent to produce any further evidence in support of a defense of good faith, a judgment in favor of respondent is quite devoid of any justifiable foundation.

2. The Court of Appeals in the very majority opinion of which we seek a review admitted:

> "It is true that the insurer made no mention of the possibility that the Brocksteins might make a contribution; the insurer apparently thought that doing so would have been improper. . . . But now that we have spoken out on the subject, insurers are put on notice and should act accordingly in the future."

And in its first opinion the same Court had declared:

> "We hold that bad faith may be evidenced by the failure of the insurer even to mention to the insured his opportunity to make a relatively small contribution to avoid a large exposure,"

and elsewhere in the opinion referred to this element as "the crux of the matter." How can there be any justification for stressing this item as being decisive, and then, upon a finding in favor of petitioners on the vital and critical issue, brushing it aside and consequently relieving respondent of any liability? It is quite understandable how Moore, Circ. J., in his dissent was constrained to observe at the outset that "the result reached by the majority is quite contrary to our previous statement on the first appeal of the principles applicable to this case."

3. The last majority opinion of the Court of Appeals appears to be squarely at variance with the law as expressed in recent holdings of the Third and Fifth Circuits. So, in *Board of Education* v. *Lumbermans Mutual Casualty Co.* (C. A. 3), 419 F. 2d 837, it was held that whether the amount defendant was willing to pay was communicated to plaintiff was crucial on the issue of good faith, citing the opinion on the first appeal herein. *Ging* v. *American Liberty Insurance Co.* (C. A. 5), 423 F. 2d

115, also cited the first *Brockstein* opinion in support of the conclusion that the duty of the insurance company

> ". . . included apprising the client of settlement opportunities within a reasonable time after they were presented; it entailed the duty to warn the client of difficulties which the litigation posed for him wherever such difficulties were not included in the contract of indemnity; it included the duty to advise the client of the outcome of the litigation and of any particular procedures which might lessen its financial impact upon him; and it included the conduct of settlement negotiations in good faith in the interests of the insured wherever those interests might be divergent from the interests of the insurance company."

It appears reasonably certain that the two other Courts referred to would have come to the opposite conclusion in the instant case. Obviously, a conflict in the law as expounded by different circuits presents a classic case for the assumption of jurisdiction by this Court.

4. Even as to the Court of Appeals for the Second Circuit, the second opinion herein suggests a different set of principles from those set forth in other reported decisions of the same tribunal, notably *Brown* v. *United States Fidelity and Casualty Company* (C. A. 2), 314 F. 2d 675, and *Young* v. *American Casualty Company of Reading, Pa.* (C. A. 2), 416 F. 2d 906. These divergences were significantly noted by Moore, Circ. J., in his dissenting opinion herein. His conclusion was that "the opinion of the majority to me seems quite contrary to our previous decisions and to the views of five judges of this court."

5. It is further manifest that the present application presents meritorious and certainly arguable questions of a

kind likely to arise in other cases and calling for authoritative disposition—especially in view of the contrary views expressed both in this as well as in other circuits. Moreover, judicial notice may well be taken of the millions of liability insurance policies now in force and of the huge volume of litigation of which their construction is dispositive. While petitioners are naturally concerned with their own rights, the controversy is of a sort with which courts are likely to be confronted in increasing number. Ultimate appellate review would be most helpful in furnishing sound guidelines to aid in the just resolution of future similar controversies.

CONCLUSION

For the foregoing reasons, your petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals may be reversed, and that petitioners be granted such other, further and different relief as may seem proper.

Dated: New York, N. Y., December 7, 1971.

Respectfully submitted,

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Opinion of United States Court of Appeals for the Second Circuit Dated October 20, 1969

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 131—September Term, 1969.

(Argued September 8, 1969 . Decided October 20, 1969.)

Docket No. 31393

NATHAN BROCKSTEIN and MANUEL BROCKSTEIN, doing business as CHURCH AVENUE POULTRY,

Plaintiffs-Appellants,

—against—

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*

SMITH and FEINBERG, *Circuit Judges.*

FEINBERG, *Circuit Judge:*

The sense of repose afforded by the knowledge that one is insured is sometimes shattered by the rude news that a policy does not fully cover a claim. What happens after that is a fertile source of litigation by insured against insurer. This is such a case, in which plaintiffs Nathan and Manuel Brockstein, doing business as Church Avenue Poultry, appeal from a judgment in favor of their insurer, de-

fendant Nationwide Mutual Insurance Company; after a non-jury trial before John F. Dooling, Jr., *J.* in the United States District Court for the Eastern District of New York. Plaintiffs sued to recover $25,000, the amount they paid in excess of the policy limit to settle a judgment against them in a death action. For reasons given below, we remand the case to the district court.

I.

The action arises out of an accident that occurred in March 1960, when Irving Bloom, an employee driving a truck owned by plaintiffs, fatally injured John F. Kiely in backing up. At that time, plaintiffs were insured by defendant Nationwide against liability for personal injuries or death resulting from use of the truck by plaintiffs or their employees. Maximum coverage for any one person was $50,000. According to the findings of the court below, Mr. Kiely died in the hospital eight days after the accident. Kiely was then 59, had an indicated life expectancy of 16.4 years, and was earning $7,000 per year. Shortly thereafter, the decedent's administratrix sued the Brocksteins and Bloom. The complaint had two causes of action: one, based on wrongful death, sought damages of $50,000 for the widow; the other, based on the deceased's pain and suffering, claimed $500,000.[1] Counsel for the administratrix was Harry H. Lipsig, an experienced and well-known trial lawyer. Settlement attempts, of which more later, were abortive; the case was tried in January 1963. The jury returned a verdict of $65,000 on the wrongful death claim and $30,000 on the pain and suffering action. Judgment, as finally entered, was for $106,413.33. This liability was discharged by payment to the administratrix of $83,847.81, of

[1] The complaint was amended to reverse these figures after the verdict came in.

which defendant Nationwide paid $58,847.81 ($50,000 plus interest and costs) and the Brocksteins paid $25,000. Thereafter, in the action now before us, the Brocksteins sued Nationwide for the $25,000.

The theory of plaintiffs' action is that under New York law, which concededly governs, Nationwide did not properly represent their interest in its efforts to settle the case. The insurance policy provided that with respect to the relevant coverage, the insurer shall:

> defend any suit against the Insured alleging such injury . . . and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.

While this broad statement appears to give the insurer unlimited settlement discretion, such is not the case—and for good reason. The policy confers upon the insurer the exclusive right to decide whether to settle or defend, but that decision may affect not only its own interest but also that of the insured. Since the insurer has that exclusive right, it must take responsibility for its exercise. While the insurer has an interest in paying out as little as possible on claims covered by its policies, the insured has an interest in not being exposed to a judgment beyond the policy limit. When these two interests conflict, the company has the unenviable duty of dealing fairly with them both. See *Harris* v. *Standard Accident & Insurance Co.*, 191 F. Supp. 538, 540 (S.D.N.Y.), rev'd on other grounds, 297 F. 2d 627 (2d Cir. 1961), cert. denied, 369 U.S. 843 (1962). Therefore, the insurer's power not to settle is actually more limited than the language of the policy indicates.

We have recently reviewed the applicable cases dealing with the insurer's obligation in settlement situations. In

Brown v. *United States Fidelity & Guaranty Co.*, 314 F. 2d 675 (2d Cir. 1963), we concluded that a New York court would require at the very least that the insurer's decision whether to defend or settle must be made in good faith and that "in evaluating the propriety of a settlement" when the interest of the company and the insured may differ, the interest of the latter "must be given at least equal consideration." We there stated, 314 F. 2d at 678, that the rule may be phrased as follows:

> "With respect to the decision whether to settle or try the case, the insurance company must in good faith view the situation as it would if there were no policy limit applicable to the claim." [Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136, 1148 (1953)] "[T]he fairest method of balancing the interests is for the insurer to treat the claim as if it were alone liable for the entire amount." Bell v. Commercial Ins. Co., 280 F. 2d 514, 515 (3d Cir. 1960).

Moreover, we quoted, 314 F. 2d at 679, from the district court opinion in *Harris, supra,* to emphasize that an insurer's bad faith

> is most readily inferable when the severity of the plaintiff's injuries is such that any verdict against the insured is likely to be greatly in excess of the policy limits, and further when the facts in the case indicate that a defendant's verdict on the issue of liability is doubtful.

New York law was again assessed in *Young* v. *American Casualty Co.*, —— F. 2d ——, slip op. 3383 (2d Cir. 1969), which was issued after Judge Dooling's decision in this case. Chief Judge Lumbard stated there for this court at slip op. 3388-89 as amended:

Where, because of the likelihood that an excess verdict will be returned, the greater financial risk of the litigation rests on the insured, a finding of bad faith on the part of the insurer may be based on such factors as these:

(1) The failure of the insurer to investigate properly the circumstances of the accident.

(2) The refusal of the insurer to accept a settlement within the limits of the policy.

(3) The failure of the insurer to inform the insured of a compromise offer.

(4) The failure of the insurer to attempt to induce contribution by the insured. [Footnote omitted.]

With this brief summary of our recent decisions construing New York law,[2] we turn to the facts of the case before us.

II.

Plaintiffs claims that the failure of Nationwide to settle the *Kiely* action against the Brocksteins for less than the policy limit of $50,000, coupled with Nationwide's other actions and inaction, conclusively show its bad faith. That the *Kiely* action could have been—and almost was—settled for less than $50,000 is clear. Judge Dooling found that the early demand in the case by Kiely's lawyer, Lipsig, was for $100,000, but that well before trial, Lipsig told O'Neill, one of the insurer's lawyers, that if the policy limit was $50,000, Lipsig would recommend settlement for $45,000, that this offer was repeated by Lipsig at a later pre-trial conference and at trial, and finally, that during the trial the presiding

[2] We note that both *Brown* v. *United States Fidelity & Guar. Co.* and *Harris* v. *Standard Acc. & Ins. Co.* were cited with approval in *Cappano* v. *Phoenix Assurance Co.*, 280 N.Y.S. 2d 695 (App. Div. 4th Dep't 1967).

judge told O'Neill that the case could be settled for $40,000. Meanwhile, the insurer's evaluation of the case for settlement purposes was not too far off from Lipsig's. When the driver of the truck, Bloom, was deposed in July 1961, plaintiff Manuel Brockstein was told by the insurer's lawyer that he thought the case would be settled out of for about $35,000. In May 1962, the insurer's Regional Manager, after a full conference with claims personnel, fixed a settlement authorization for the case of $35,000, which apparently was never changed. However, its lawyers were only given "authority" at that time to go to $25,000. Five months later, this authority was increased to $32,000. Nevertheless, in the byzantine bargaining that so often characterizes these cases, Lipsig was apparently never offered more than $15,000 until the trial, when an offer of $32,500 was made. During trial, the insurer finally authorized its attorney to go to $35,000, and this offer was made. Whether this was done while Lipsig was still prepared to take $40,000 is not clear;[3] what is clear is that the parties were at one time during the trial apart by $7,500 at most—and possibly by only $5,000. The jury returned a verdict of $95,000.

Turning to factors emphasized in *Harris* and *Brown*, the parties disagree as to what was a reasonable prediction of the verdict in the *Kiely* action. Kiely was earning $7,000 a year and had a life expectancy of over 16 years when he was killed, had been steadily employed for 30 years before and had no history of prior illnesses. While his widow would not be automatically entitled to an award of Kiely's entire expected salary, nevertheless a verdict in excess of $50,000 on these items alone was

[3] Judge Dooling found that after Lipsig rested his case in the *Kiely* action, he raised his figure to $50,000.

readily predictable.[4] When to this is added a sum for Kiely's pain and suffering for the eight days he lingered, while conscious, in the hospital, it was obvious—in the words of *Harris* and *Brown*—that a verdict "greatly in excess of the policy limits" was "likely," if liability is assumed. As to that, the insurer was inexplicably optimistic about the possibility of a defendant's verdict in a case where Bloom, the driver of the truck, had no visibility "in the center rear," as Judge Dooling found, and injured Kiely while backing up. It is true that Bloom stated at his deposition that he had sounded his horn, but he apparently had never said this before, either to police officers who investigated the accident or at a Motor Vehicle Bureau hearing. All in all, it is clear, in the language of *Harris* and *Brown*, that "a defendant's verdict on the issue of liability" was "doubtful," at the very least.

Accordingly, allowing the case to continue made it highly probable that the Brocksteins would be subjected to personal liability. Their personal exposure was high; it turned out to be $45,000. The additional risk to the insurer was far less; $10,000 at most, assuming that Lipsig would accept $40,000 in settlement. Moreover, that disposition could have been achieved by an additional offer of $5,000 to $7,500. While all of this under the cases already referred to could be evidence of bad faith, it was certainly not conclusive. Were the inquiry to stop there, we would not be inclined to disturb Judge Dooling's conclusion that Nationwide did not breach its obligations

[4] Nationwide argues that the expected verdict would be diminished by reducing to present value the widow's expectancy from Kiely's future earnings. On the record before us, we cannot tell whether such a charge was given in the *Kiely* action or even requested. As to the uncertain practice in New York on such a request, see Committee on Pattern Jury Instructions, New York Pattern Jury Instructions—Civil §2.320, Comment pp. 516-18 (1965).

to plaintiffs, even though the judge may have been unduly restrictive in assessing the inferences open to him under New York law.[5] However, the troubling aspect of the case is what transpired between the insurer and its insured, to which we now turn.

In his opinion, 266 F. Supp. at 224, Judge Dooling concluded that at the crucial stage of settlement

> plaintiffs, early notified that the case involved a claim in excess of coverage, and advised during trial of the stages of negotiation and that an adverse verdict was possible and could go into excess, took no action tacitly looking to defendant to handle the matter. The defendant insurer elected to go to verdict, and the result was disastrous.

The judge also made separate findings that the Brocksteins neither were asked to contribute nor volunteered to do so, and that they were neither given advice on how to proceed nor asked for it.[6] It is not clear from the findings

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[5] The judge characterized New York law as

> unyielding in declining to recognize any duty to settle, or to see "bad faith" in refusals to settle, or other acts; that, circumstantially, suggest that the insurer pursued its own interest and left the insured to take care of his own exposure to uninsured liability.

266 F. Supp. at 225. That this appears to be in conflict with this court's statement in *Brown*, 314 F. 2d at 678, was recognized by District Judge Port in *Bates* v. *Merchants Mutual Ins. Co.*, 277 F. Supp. 308, 312 (N.D.N.Y. 1967), aff'd *per curiam*, 392 F. 2d 591 (2d Cir. 1968).

[6] The only written advice given was a letter from Nationwide to the Brocksteins in January 1962—after the key depositions in the case had been taken—which stated:

> As you know the accident involving John F. Kiely who was killed in an accident on March 7, 1960 has commenced an action against the company and against Irving Bloom. This matter has been in suit for some time and as you may

(footnote continued on next page)

whether the Brocksteins were kept adequately informed of the course of settlement negotiations, of the realistic chances of an adverse verdict about the policy limits, and of how high such a verdict might be. In particular, it is not clear whether the Brocksteins were ever told that $40,000 would settle the case, and that the insurance company was not willing to go beyond $35,000. The failure to keep the Brocksteins informed in this matter could itself contribute to an inference of bad faith under the authorities discussed above. Moreover, even if it is found that the Brocksteins were kept fully and precisely advised, they were never told—either when Nationwide cursorily informed them that they had a right to have their own separate counsel participate[7] or when the settlement negotiations were at their peak—that they could contribute to a settlement.

The insurer argues that it is "ridiculous"[8] to assume that the Brocksteins were so willing, but we do not agree. Perhaps they would not have advanced one cent, but we

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(footnote continued from previous page)

remember is being handled for you and for Nationwide by James T. Whalen's office. We know you have been giving him every cooperation possible. We wish to call your attention to the fact that you have been sued for an amount in excess of your policy limits. To that extent therefore you have an uninsured interest in this action. If you should desire to retain your own personal attorney at your own expense to protect this uninsured interest please feel free to do so. Understand however that whether or not you should do this rest entirely with you.

If you have any further questions about this matter please do not hesitate to call this office or the offices of Mr. Whalen at any time. Our telephone number here is WHite Plains 8-6500.

The first sentence of the letter was, of course, not only obscure but inaccurate in its reference to an action against the company. As the Brocksteins found out to their ultimate dismay, the action was against them.

[7] See note 6 *supra*.

[8] Appellee's brief, p. 15.

simply do not know what plaintiffs would have done if the subject of contribution had been discussed with them at the crucial time with explicit advice as to the possible alternative course open and the additional amount required to settle. At the very least, we think that the trial judge should make a finding on the issue. For the crux of the matter is this: At the time when the parties were so close, the Brocksteins needed what then District Judge Kaufman in *Harris, supra*, 191 F. Supp. at 543, n. 10, called the "judgment . . . of an informed expert," since they could "hardly be expected to make an objective appraisal of the facts and relevant law in their own case." This need is pointed up by Nationwide's reliance in this court on testimony of Nathan Brockstein that he did not think that Bloom was responsible for the accident and that he would not be willing to pay money for something he was not responsible for. Such a decision by an insured cries out for the "judgment of an informed expert"—for precise information and an informed reasonable prediction rather than cursory information. In assessing Nationwide's liability here, great significance would attach to a finding whether the Brocksteins would have made a contribution to the settlement had they been *properly* apprised of the possibilities of the risk they ran. We note that under *Young, supra* at 3390-91, the burden is on Nationwide to show that the Brocksteins would not have contributed.

We realize that the situation of the insurer at that stage is delicate: If it presses its insured too hard—or even at all—that may be evidence of bad faith,[9] but if it does abso-

[9] While there do not seem to be any New York cases directly on point, suggestions that the insured contribute to a settlement have been relied on in a number of jurisdictions as one indication of bad faith. See, e.g., *American Mut. Liab. Ins. Co.* v. *Cooper*, 61 F. 2d 446 (5th Cir. 1932), cert. denied, 289 U.S. 736 (1933); *Brown & McCabe, Inc.* v. *London Guar. & Acc. Co.*, 232 F. 298 (D. Ore. 1915); Keeton, *supra* at 1149 n. 32; 7A J. Appleman, Insurance Law and Practice §4711 n. 12 (1962).

lutely nothing that too may count against it.[10] Judge Dooling clearly saw the problem, but apparently concluded that the insurer, to avoid a finding of bad faith, need never engage in conduct in between these two extremes. We do not agree. The judge aptly recognized the need for "a controlled arms-length discussion between the assured and the insurer about their respective interests in the settlement." 266 F. Supp. at 227. We think that this need must be met, a proposition not adequately recognized by the judge.[11] There is nothing per se improper in the bare mention by the insurer that contribution is possible.[12] Any impropriety would seem to arise from *insistence* upon a contribution as the price of settlement, particularly where the amount demanded is relatively high compared with what the insurer is willing to contribute. There is no inconsistency in requiring the insurer to *inform* the insured of his chance to make a contribution in order to settle the case. We hold that bad faith may be evidenced by the failure of the insurer even to mention to the insured his opportunity to make a relatively small contribution to avoid a large exposure. Although we find no New York case directly on point, we believe that this holding is a correct prediction of what the New York courts would decide on the issue.

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[10] Indeed, the situation of the insurer's lawyer is even more delicate. See Keeton, *supra* at 1157-73. Keeton suggests various changes in policy forms to remove potential conflict. *Id.* at 1183-86.

[11] Thus, the judge stated, 266 F. Supp. at 227, that at the critical point the insurer's lawyer

> deals with the personal-injury plaintiff not as representing the assured but as representing the insurer to the extent of its interest, and without, apparently a duty even to report the settlement discussion to his nominal client, the assured.

[12] Keeton, *supra* at 1149-50 n. 32.

Accordingly, we remand the case to Judge Dooling to make further findings—on this record if he can or on a reopened record if necessary—as to (1) precisely what the Brocksteins were told or knew regarding the amount needed to settle the *Kiely* action, the amount the insurer was willing to contribute, and what their potential personal liability was, and (2) what they were then willing to contribute themseves.[13] Thereafter, the court should again decide upon the entire record whether Nationwide acted in bad faith under the principles set forth herein. Judgment remanded for further proceedings consistent with this opinion.

[13] We do not preclude the judge from reopening the record to ascertain other facts, see, e.g., note 4 *supra*.

Opinion of United States Court of Appeals for the Second Circuit After Remand Dated September 21, 1971

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 849—September Term, 1970.

(Argued June 28, 1971 Decided September 21, 1971)

Docket No. 71-1071

NATHAN BROCKSTEIN and MANUEL BROCKSTEIN, doing business as CHURCH AVENUE PROPERTY,

Plaintiffs-Appellants.

against

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

Before:

MOORE, FEINBERG AND MANSFIELD,
Circuit Judges.

FEINBERG, *Circuit Judge:*

In the prior appeal in this case, *Brockstein v. Nationwide Mutual Insurance Co.*, 417 F.2d 703 (2d Cir. 1969), with which familiarity will be assumed, we remanded to the district court to determine again whether the Brochsteins, plaintiffs-insureds, were entitled to recover dam-

ages from their insurer because of its failure to settle an action brought against plaintiffs by the administratrix of John F. Kiely (Kiely). As a result of that mistake in judgment, Kiely recovered $95,000 against the Brochsteins, $45,000 more than the amount of the policy provided by defendant. The Brochsteins' excess liability to Kiely was ultimately settled for $25,000, for which they sued defendant-insurer. In our earlier decision, we held, among other things, that the bad faith of an insurer in refusing to settle a claim against the insured

> may be evidenced by the failure of the insurer even to mention to the insured his opportunity to make a relatively small contribution to avoid a large exposure.

417 F.2d at 709. We sought further findings as to

> (1) precisely what the Brocksteins were told or knew regarding the amount needed to settle the *Kiely* action, the amount the insurer was willing to contribute, and what their potential person liability was, and (2) what they were then willing to contribute themselves. [Footnote omitted.]

and directed the trial court again to

> decide upon the entire record whether Nationwide acted in bad faith under the principles set forth herein.

On remand, Judge Dooling made extensive further findings of fact, including the key finding that:

> The inference of constructive bad faith that might be drawn in some circumstances from the failure of the insurer to mention to the insured his opportunity to make a contribution to the settlement in order to avert the risk of a verdict in ex-

> cess of the policy limit is insufficient on the facts of the present case to establish bad faith in fact.

The judge again found for defendant-insurer, and this appeal followed.

Appellants claim that the judge did not follow our directions and that defendant acted in bad faith as a matter of law. As to the former contention, Judge Dooling reopened the record, as our opinion authorized, heard testimony from five witnesses, including one of the plaintiffs and the lawyer who defended the *Kiely* action against them, and carefully reconsidered the question of the insured's bad faith in refusing to settle that action. There is no doubt at all in our minds that the judge attempted to and did comply with our directions in all respects.

Appellants' alternative argument is that, in any event, the findings of the judge on remand required a conclusion as a matter of law that the insurer acted in bad faith. Appellants base their claim principally on the findings that plaintiffs had cash on hand sufficient to make a contribution to the settlement of even $10,000, but were not requested to do so and were not told that a relatively small contribution on their part would avoid a large exposure or that such a course was possible.

The judge did make the findings to which plaintiffs refer. But he also characterized as "necessarily hypothetical and not adequate as the basis for a finding" the testimony of one of the plaintiffs that he would have contributed from $5,000 to $12,500 to a settlement if defendant had advised him he could. The judge also found that O'Neill (trial counsel for the Brochsteins and the insurer) did advise the Brochsteins that the outcome was not predictable, that the verdict could be in excess of the policy limits, what the "posture of the settlement discussions [were] as they progressed during trial, from which the

difference between offer and demand was evident," and what amount the insurer was willing to offer. The judge also found that the Brochsteins "understood that [if a verdict were rendered in excess of the policy limit] in such case the liability would be their firm's." Finally, the judge pointed out that if there had been a negotiation between the Brochsteins, the insurer and the Kiely interests, all sorts of eventualities might have occurred; *e.g.*, Kiely could have increased the demand upon learning that further sums were available or the Brochsteins might not have been willing to make a substantial contribution unless the insurer made a similar increase.

As we pointed out in our earlier opinion, 417 F.2d at 705, the ultimate issue before the judge was whether the insurance company dealt fairly and adequately with its insured under New York law.[1] A finding of good faith or lack of bad faith is merely a shorthand way of resolving the series of issues embodied in that concept. When the trier of fact is convinced that under the applicable law the insurer on all the evidence did deal properly with its insured, we are not disposed to overrule that judgment. It is true that the insurer made no mention of the possibility that the Brochsteins might make a contribution; the insurer apparently thought that doing so would have been improper. As we noted in the first appeal, 417 F.2d at 708-09, its concern at that time is understandable. But now that we have spoken out on the subject, insurers are put on notice and should act accordingly in the future. This means that they must tread the narrow and difficult line between merely informing the insured in a proper case "of his chance to make a contribution in order to settle the case" and insisting "upon a contribution as the

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[1] We note that some jurisdictions apparently impose a stricter standard of liability upon the insurer than New York does. See generally Note, Recent Developments in the Excess Judgment Suit, 36 Bklyn L. Rev. 464 (1970); 64 De Paul L. Rev. 604 (1970).

price of settlement." 417 F.2d at 709. Insurers must be particularly careful not to do the latter or to use the possibility of contribution from the insured as a means of evading their own responsibilities.

We do not suggest that this is an open and shut case or that the problem it illumines can be dealt with easily. The contrary is the fact. As Judge Dooling pointed out:

> [T]he limited coverage situation becomes flatly unsatisfactory in the final settlement stages if the insured has not retained counsel to represent him in his role as self-insurer on the excess risk.

We agree and point out as we did before, 417 F.2d at 709 n.10, that the insurer's lawyer at that stage is in a "delicate" situation.[2] For the future, we suggest that an insurer must be careful to give an insured full and accurate information as to settlement possibilities not only in the early, but also in the late, stages of negotiation, including the advice that to the extent that there is an uninsured interest, the insured has the option of being represented by separate counsel. But on this record and after the careful sifting of the evidence by the district judge, we should reverse his finding of no bad faith only if the rule is that failure to notify an insured of his opportunity to contribute always requires a finding of bad faith. But this court did not go that far in our prior opinion or in the cases upon which we relied, *e.g.*, *Young* v. *American Casualty Co.*, 416 F.2d 906 (2d Cir. 1969); *Brown* v. *United States Fidelity & Guaranty Co.*, 314 F.2d 675 (2d Cir. 1963). And we decline to adopt such a rule now.

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[2] *Cf. Lysick* v. *Walcom*, 65 Cal. Rptr. 406 (Ct. App. 1968), discussed in Sevier, Beyond the "Bad Faith" Rule: New Excess Liability for Insurance Carriers and Their Attorneys, Proceedings, ABA Section of Insurance, Negligence, and Compensation Law 391, 396-99 (1969).

At oral argument appellants called to our attention two recent decisions which cite our prior opinion. But both support the view that the decision here is essentially for the trier of fact. In *Ging* v. *American Liberty Insurance Co.*, 423 F.2d 115 (5th Cir. 1970), summary judgment for the insurer was reversed so that a trial could be had on the issue of good faith. In *Board of Education* v. *Lumbermens Mutual Casualty Co.*, 419 F.2d 837 (3d Cir. 1969), the trier of fact found against the insurance company, and the appellate court affirmed.

Judgment affirmed.

MOORE, *Circuit Judge* (dissenting):

Because in my opinion the result reached by the majority is quite contrary to our previous statement on the first appeal of the principles applicable to this case, *Brockstein* v. *Nationwide Mutual Insurance Company*, 417 F.2d 703 (1969) and the fact hitherto found which I believe to be determinative, I must dissent.

There is little need to search beyond our earlier opinion and Judge Dooling's findings on remand. The background of fact has been adequately stated. Suffice it to say that the Brochsteins held a $50,000 accident insurance policy issued by Nationwide. An accident occurred and they were sued in an action referred to as the *Kiely* case. At this point we must consider the only operative facts as found by this court.

"That the *Kiely* action could have been—and almost was—settled for less than $50,000 is clear."

Judge Dooling (on the first trial) found that the early demand of Lipsig (Kiely's lawyer) was for $100,000 "but that well before trial, Lipsig told O'Neil (Nationwide's

lawyer) * * * that if the policy was for $50,000 [which it was], Lipsig would recommend settlement for $45,000, that this offer was repeated by Lipsig at a later pre-trial conference and at trial, and finally, that during the trial the presiding judge told O'Neill that the case could be settled for $40,000." 417 F.2d at 706. Thus the proof is incontestable that the case could have been settled within the policy limits and the Brochsteins completely relieved of the liability from which they were protected under the policy which they had purchased for this purpose. Nationwide failed to make the available settlement. Instead it proceeded to trial and a $95,000 verdict was returned. As a result the Brochsteins instead of being fully protected found themselves subjected to a $45,000 excess policy judgment which they ultimately settled for $25,000. Upon these facts and the law, Nationwide's liability would appear to have been clear. How then does a contrary result occur? This court's previous opinion points to the answer. It spoke in terms of "bad faith", failure of Nationwide to advise the Brochsteins of their opportunity to make a contribution to a settlement (a factor wholly irrelevant to the issue) and whether the Brochsteins would have made a contribution to a settlement even if so advised by Nationwide of any such possibility (equally irrelevant). However, this court remanded the case to Judge Dooling to make findings (and on further testimony if necessary) as to what was told to the Brochsteins by Nationwide relating to the amount needed to settle the *Kiely* action, the amount Nationwide would contribute and the Brochstein's potential liability—all to determine whether Nationwide acted "in bad faith."

In my opinion Judge Dooling's further findings made at our behest do not meet the controlling legal issues. Thus he finds (#86,306a) that "There is no evidence that there was actual bad faith on Nationwide's part (acting through

O'Neill or other representative than O'Neill) * * *." Again in Finding #87 he stresses contribution and failure by Nationwide to mention this possibility to the Brochsteins as leading to an "inference of constructive bad faith." Herein lies the error in the approach of Judge Dooling and the majority opinion. It is unnecessary under the law to find "bad faith" as evidenced by facts showing evil motive or purpose.

In *Young* v. *American Casualty Company of Reading, Pa.*, 416 F.2d 906 (1969), Judge Lumbard (then Chief Judge) said at page 910 that "a finding of bad faith on the part of the insurer may be based on such factors as these: * * * (2) The refusal of the insurer to accept a settlement within the limits of the policy * * *."

Lack of any necessity to couch "bad faith" in terms of evil purpose appears from Judge Lumbard's further comments that "in the usual case, to establish bad faith by the insurer an insured should demonstrate that the claim could have been settled within the policy limits, * * *." Here the majority say that in this case this fact (settlement within the limits of the policy) is "clear." Judge Lumbard continued: "Where an insurer receives an offer of settlement in excess of the coverage of its policy, it acts in bad faith if it fails to make an attempt * * * (to secure a reduction) and * * * (fails to advise the insured of settlement opportunities) * * *." An *a fortiori* case is presented where, as here, the basic fact is conceded that a settlement could have been effected within the limits of the policy.

Even in Judge Wyatt's dissenting opinion in *Young*, it was stated that "the core of the actionable wrong is the failure or refusal of the insurance carrier to settle when settlement within the policy limit *could have been*, and should have been, effected." *Young*, p. 912. The "essen-

tial element of the case for the insured [was] that the claim could have been settled within the policy limit." Again here that fact is not disputed.

A somewhat similar situation arose in *Brown* v. *United States Fidelity and Casualty Company*, 314 F.2d 675 (1963) in which this court reversed the dismissal of a complaint in an action by an insured against an insurance company for failure to settle. In that opinion Judge Kaufman writing for the court said that "we are convinced that the good-faith settlement standard controls in New York in cases of an assured's personal liability resulting from the insurer's failure to settle within the policy limits." *Brown* at 678.

If "bad faith may be evidenced by the failure of the insurer even to mention to the insured his opportunity to make a relatively small contribution to avoid a larger exposure," as held in *Brockstein, supra*, at 709, how much the more is it evidenced by the established fact that a settlement could have been effected within the policy limits —not requiring even a small contribution.

Since the opinion of the majority to me seems quite contrary to our previous decisions and to the views of five judges of this court, I would reverse the judgment dismissing the action on the merits.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-774

NATHAN BROCKSTEIN and MANUEL BROCKSTEIN, doing business as CHURCH AVENUE POULTRY,

Petitioners,

against

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Summary of Argument

There is no legal basis for reviewing the decision of the court below.

Argument

None of the considerations which, under Rule 19 of the Rules of this Court, are to govern review on certiorari are present in the instant case. Clearly, there is no federal question; nor can it be urged by the petitioners that the Second Circuit has decided this matter against them in conflict with New York law. Moreover, the petitioners' efforts to contend (p. 5)* that the Second Circuit's deci-

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* References are to pages of the Petition.

sion is in conflict with the decision in other circuits is somewhat contrived.

As the Second Circuit stated in its second opinion (17a):

> ". . . on this record and after the careful sifting of the evidence by the district judge, we should reverse his finding of no bad faith only if the rule is that failure to notify an insured of his opportunity to contribute always requires a finding of bad faith. But this court did not go that far in our prior opinion or in the cases upon which we relied, *e.g., Young* v. *American Casualty Co.*, 416 F.2d 906 (2d Cir. 1969); *Brown* v. *United States Fidelity & Guaranty Co.*, 314 F.2d 675 (2d Cir. 1963). And we decline to adopt such a rule now."

and further (16a):

> "As we pointed out in our earlier opinion, 417 F.2d at 705, the ultimate issue before the judge was whether the insurance company dealt fairly and adequately with its insured under New York law. A finding of good faith or lack of bad faith is merely a shorthand way of resolving the series of issues embodied in that concept. When the trier of fact is convinced that under the applicable law the insurer on all the evidence did deal properly with its insured, we are not disposed to overrule that judgment."

It is clear from both the opinion of the Third Circuit in the *Lumbermens* case (419 F.2d 837), as well as the much lengthier opinion of the District Court which it was affirming (293 F.Supp. 541), and the opinion of the Fifth Circuit in the *American Liberty* case (423 F.2d 115) that both of these circuits are also applying the "lack of good faith" test and that no single error or omission on the part of the insurer is to be deemed controlling in all cases. Moreover, some disagreement among the circuits must

obviously be expected in this area, since these are diversity cases in which the varying laws of the several states are being applied.

Finally, the petitioners' reliance upon the opinions expressed by Moore, Cir. J., in his dissent (18a) is somewhat obscure, since it is clear that this judge would go far beyond the rules enunciated in any of the other cases, and impose a standard of absolute liability upon an insurance carrier who could have settled the case within the policy limits, but did not do so.

With respect to the opinion of the other judges, it is far more important to note that the petitioners did not see fit in this instance to apply for an *en banc* hearing by the Second Circuit.

CONCLUSION

The instant petition for a writ of certiorari should be in all respects denied.

Respectfully submitted,

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